

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:MSR:NCE:STP:TL-N-715-99  
DLZoss

date: March 7, 2000

to: Chief, Examination Division, North Central District  
Attn: [REDACTED], Group Manager, Group [REDACTED]

from: District Counsel, North Central District, St. Paul

subject: [REDACTED], Form 872

DISCLOSURE STATEMENT

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This is written in response to your request for our opinion concerning the sufficiency of a Form 872 previously secured to extend the assessment statutes of [REDACTED] and its subsidiaries ([REDACTED]) for the periods ended September 30, [REDACTED] ([REDACTED]). We recommend that the Form 872 previously secured should be revised as indicated below and re-executed if sufficient time remains to do so because of the presence of ambiguous language immediately above the signature of the [REDACTED] officer. However, if there is insufficient time remaining to revise and re-execute the previously secured Form 872, based upon the following discussion we believe that it is defensible as sufficient to extend the assessment statutes of the [REDACTED] for the [REDACTED] period.

FACTS

██████████, a Delaware corporation, was the consolidated parent of a group of companies, including ██████████, which received partnership distributions, for the taxable period ended September 30, ██████████. ██████████ was itself a wholly-owned, indirect subsidiary of ██████████, a ██████████ company. ██████████ (██████████), was also a Delaware corporation. On ██████████, ██████████ merged with and into ██████████. According to the certificate of merger ██████████ was absorbed into ██████████ which was the surviving corporation following execution of the merger. On ██████████, ██████████ changed its name to ██████████ (██████████).

In January of 1999, on your request, we informally advised you that securing a Form 872 captioned "██████████, formerly ██████████, successor-in-interest (by merger) to ██████████," would be the appropriate means by which to secure an extension of assessment statutes for the ██████████ period for ██████████ and its subsidiaries. At that time we also engaged in some discussion concerning the necessity and/or advisability of also securing Forms 977 and 2045 (transferee forms) under the circumstances.

On ██████████, the taxpayer tendered a Form 872 captioned:

██████████, formerly  
██████████, successor-in-interest  
(by merger) to ██████████.

The EIN box at the top of the tendered Form 872 contains ██████████'s EIN, ██████████. The first page of the tendered Form 872 also contains an added, typed statement to also extend the period of limitations for assessments of any tax, including penalties and interest, attributable to partnership items under I.R.C. § 6231(a)(3), affected items under I.R.C. § 6231(a)(5); computational adjustments under I.R.C. § 6231(a)(6); and partnership items converted to non-partnership items pursuant to I.R.C. §§ 6231(b) and 6231(c).

The signature block of the tendered Form 872 reads:

██████████, formerly  
██████████, successor-in-interest  
(by merger) to ██████████ EIN ██████████

██████████ EIN ██████████

The tendered Form 872 is signed by [REDACTED] as Vice President, Taxes, and as Assistant Secretary and Assistant Treasurer. According to a unanimous written consent of Directors of [REDACTED] dated [REDACTED], [REDACTED] is named Vice President - Taxes.

#### DISCUSSION

Treas. Reg. § 1.1502-77(a) provides generally that the common parent of a consolidated group is the sole agent for each subsidiary in the group for any consolidated return year. Expressly included in the authority of the common parent is the power to execute waivers. Treas. Reg. § 1.1502-77(a) further provides that its provisions shall apply "whether or not a consolidated return is made for any subsequent year, and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time."

Treas. Reg. § 1.1502-77T provides for alternative agents where a corporation that is the common parent of a group ceases to be the common parent. Under Treas. Reg. § 1.1502-77T(a)(3) & (4), a waiver of the statute of limitations given with respect to the group will be deemed to be given by the agent for the group if it is given by any of the following:

- (i) The common parent of the group for all or any part of the year to which the notice or waiver applies,
- (ii) A successor to the former common parent in a transaction to which section 381(a) applies,
- (iii) The agent designated by the group under § 1.1502-77(d), or
- (iv) If the group remains in existence under § 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

I.R.C. § 381(a)(2) applies where a corporation acquires the assets of another corporation in a transfer to which section 361 applies, if the transfer is in connection with a reorganization which is, inter alia, described in I.R.C. § 368(a)(1)(F).

In the present case, [REDACTED] can execute consents for the [REDACTED]'s [REDACTED] taxable year as agent for the group under Treas. Reg. § 1.1502-77T(a)(4)(ii). Further, even though [REDACTED] was not itself a member of the group prior to the [REDACTED] merger, it is directly liable for any taxes owed by the [REDACTED] under Treas. Reg. § 1.1502-6 and Delaware state law. Treas. Reg. § 1.1502-6

provides that each member of a consolidated group can be held severally liable for the entire consolidated tax liability of the group. Delaware law provides that the surviving corporation in a merger assumes all liabilities of the constituent corporations which may be enforced against the survivor as if those liabilities had been incurred or contracted by it. [REDACTED]

[REDACTED]. Thus, [REDACTED], as successor-in-interest to [REDACTED] can be liable for any [REDACTED] tax deficiency of the [REDACTED]. Accordingly, Form 872 is sufficient in this case to secure the statute extension. A transferee agreement (Form 2045) and a transferee statute extension (Form 977) are not needed.

Based on the foregoing we believe that the statute extension presented for our review with your request can be defended as sufficient to extend the [REDACTED] period for the [REDACTED]. However, the insertion of "[REDACTED] EIN [REDACTED]" immediately above the signature of the [REDACTED] officer does create some ambiguity as to the intent of the taxpayer when the Form 872 was executed.

To ensure that the Service can proceed against both [REDACTED] and its subsidiaries, including the remaining members of the [REDACTED], we recommend that future Forms 872 be prepared as follows:<sup>1</sup>

1. The line for the taxpayer's name at the top of the first page of the Form 872 should read:

[REDACTED] (EIN [REDACTED]), formerly [REDACTED], as agent for the consolidated group and as successor-in-interest by merger to [REDACTED] [REDACTED] (EIN [REDACTED])\*

The following footnote should be placed below the statement concerning assessments of items defined in I.R.C. § 6231 at the bottom of the first page of the Form 872:

\* with respect to the consolidated income tax liability of [REDACTED]

"[REDACTED]"

2. The EIN of [REDACTED] ([REDACTED]) should be used in the box for the taxpayer's EIN in the upper right corner of

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<sup>1</sup>If there is sufficient time we recommend replacing the Form 872 submitted for our review with one prepared along the following lines, notwithstanding the above comments that the existing Form 872 is defensible.

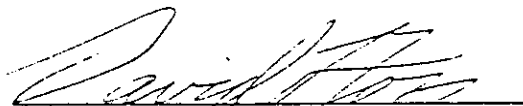
the first page of the Form 872.

3. The signature block on the second page of the Form 872 should name "[REDACTED] (EIN [REDACTED])" and should be executed by a current officer of [REDACTED].

If you have any questions respecting this matter, please call David L. Zoss at [REDACTED].

REID M. HUEY  
District Counsel

By:



DAVID L. ZOSS  
Senior Attorney

cc: Assistant Chief Counsel  
(Field Service)